IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5931

CARPET GROUP INTERNATIONAL, ET AL.,

Plaintiff-Appellant,

v.

ORIENTAL RUG IMPORTERS ASSOCIATION, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1. It accordingly has a strong interest in ensuring that this law, including its jurisdictional requirements, is interpreted in a manner that does not improperly impede antitrust litigation.

STATEMENT OF ISSUES

Whether the district court has subject matter jurisdiction over this antitrust case.

STATEMENT OF THE CASE

Nature of the case. This is a civil action for damages and injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

Course of proceedings and disposition. Plaintiffs filed suit in the district court on October 30, 1995. After extended preliminary skirmishing, defendants moved on July 7, 1997 to dismiss plaintiffs' complaint for lack of subject matter jurisdiction, and on February 11, 1998 Magistrate Judge Haneke issued a Report and Recommendation ("RR") concluding that the motion should be granted.[1] On October 29, 1999, District Judge Greenaway adopted the magistrate's Report and Recommendation and ordered plaintiffs' complaint dismissed.

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[1]Citations to "RR" are to the Magistrate Judge's Report and Recommendation of February 11, 1998.

STATEMENT OF FACTS

Plaintiffs Carpet Group International Corporation (CGI) and Emmert Elsea sponsored two trade shows in the United States in 1993 and 1994 at which foreign manufacturers of oriental rugs were given the opportunity to sell their rugs directly to U.S. retailers. Plaintiffs also organized buying trips during this period on behalf of U.S. retailers, wherein retailers traveled to rug manufacturing countries and purchased rugs directly from foreign manufacturers. RR 2. Plaintiffs' trade shows and buying trips were designed to bypass established rug importers and thereby result in lower rug prices. Id.

The defendants are a group of U.S.-based importers and wholesalers of oriental rugs who act as middlemen between foreign manufacturers and U.S. retailers. Compl. 3-4.[2] The defendants viewed the trade shows and buying trips as a threat to their business and allegedly conspired amongst themselves and with their trade association and co-defendant, the Oriental Rug Importers Association (ORIA), to eliminate this threat. Compl. 6-7. Plaintiffs allege that the defendants collectively took several steps which wrecked plaintiffs' trade shows, including:

> (1) threatening not to purchase rugs from any manufacturer that participated in the trade shows;

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[2]Citations to "Compl." are to the plaintiffs' Second Amended Complaint and Demand for Jury Trial, dated September 18, 1997.

(2) threatening not to purchase rugs from any manufacturer that sells rugs directly to any retailer on a buying trip;

(3) threatening not to sell rugs to any U.S. retailer that participated in the trade shows or buying trips;

(4) retaliating against manufacturers that participated in plaintiffs' trade shows by ceasing purchases of rugs from those manufacturers;

(5) threatening to expel from the ORIA any ORIA member that participated in plaintiffs' trade shows; and

(6) inducing the Carpet Export Promotion Council of India, the Export Promotion Board of Pakistan, and the Pakistan Carpet Manufacturers and Exporters Association not to subsidize the participation of manufacturers from those countries in plaintiffs' trade shows.

RR 3; Compl. 7.

Plaintiffs sued, claiming that defendants' actions constituted a conspiracy to restrain trade and to monopolize the U.S. market for oriental rugs in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

The defendants moved to dismiss for lack of subject matter jurisdiction, and the Magistrate Judge agreed and recommended dismissal. He concluded (1) that the court's subject matter jurisdiction over plaintiffs' claims was governed by the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. 6a, (RR 5-6) and (2) that plaintiffs failed to establish jurisdiction under the FTAIA because they failed to prove that defendants' actions had a substantial effect on U.S. domestic

commerce (RR 10-11). The district court adopted the Report and Recommendation.

SUMMARY OF ARGUMENT

The effect of the FTAIA is narrow. The statute applies only to restraints on U.S. export commerce and purely foreign transactions. The statute provides that federal courts have subject matter jurisdiction in such cases only if the restraint is shown to produce a direct, substantial, and reasonably foreseeable effect on domestic commerce, U.S. import commerce, or the export opportunities of a person engaged in exporting from the United States. By contrast, with respect to anticompetitive conduct involving either U.S. domestic or import commerce, the FTAIA has no effect on the well-established principles of Sherman Act jurisdiction.

Plaintiffs' antitrust claims are not subject to the FTAIA. Plaintiffs' claim that defendants conspired to wreck their U.S.-based trade shows alleges a restraint on commerce that involves either domestic or import commerce, or both. The FTAIA does not apply to that claim; accordingly, the ordinary principles of Sherman Act jurisdiction, rather than the FTAIA, govern the district court's subject matter jurisdiction.

Similarly, plaintiffs' claim that defendants took various actions to destroy plaintiffs' business of organizing buying trips alleges a restraint of U.S. import commerce. Again, the ordinary principles of Sherman Act jurisdiction, rather than

the FTAIA, govern the district court's subject matter jurisdiction over that claim.

Finally, plaintiffs' allegations are adequate to establish Sherman Act jurisdiction. To the extent that the restraints involve domestic commerce, plaintiffs have adequately alleged that the conspiracy affected a not insubstantial amount of interstate commerce. To the extent that the restraints involve import commerce, plaintiffs have adequately alleged that defendants' conduct was meant to produce and did in fact produce a substantial effect in the United States.

STANDARD OF REVIEW

Whether the FTAIA applies in this matter is a question of law subject to de novo review. Williams v. New Castle County, 970 F.2d 1260, 1264 (3d Cir. 1992); United States v. Adams, 759 F.2d 1099, 1106 (3d Cir. 1985).

ARGUMENT

I. The District Court Erred in Concluding that the FTAIA Governs the Court's Subject Matter Jurisdiction Over Plaintiffs' Claims

A. Congress granted the federal courts broad subject matter jurisdiction under the Sherman Act.

The Sherman Act prohibits conduct in restraint of "trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1, 2. With respect to restraints on domestic commerce -- i.e., commerce "among the several states" -- the Sherman Act reaches all conduct that is shown "'as a matter of practical economics'

to have a not insubstantial effect on the interstate commerce involved." McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980), quoting Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976). Moreover, the Court has long emphasized that it is the existence rather than the size of an interstate effect that confers jurisdiction. See, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 485 (1940); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330-31 (1991). With respect to restraints on U.S. commerce with foreign nations, "it is well established," as the Supreme Court explained in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), that the reach of the Sherman Act includes "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796; also id. at 796-97 & nn.22, 24 (citing approvingly Judge Learned Hand's opinion in United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443-55 (2d Cir. 1945)). See also United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1143 (1998) (Sherman Act applies to criminal price-fixing occurring solely abroad, so long as the conduct was intended to and did have effects in the United States).

The FTAIA largely codifies this consensus respecting courts' broad subject matter jurisdiction to hear Sherman Act claims involving foreign commerce. That statute provides, in relevant part, that the Sherman Act:

> shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless --
>
> > (1) such conduct has a direct, substantial, and reasonably foreseeable effect --
> >
> > > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> > >
> > > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States[.]

15 U.S.C. § 6a.

The effect of the FTAIA is narrow: The statute limits courts' subject matter jurisdiction over restraints on U.S. export commerce and purely foreign transactions to instances in which the restraint is shown to produce a direct, substantial, and reasonably foreseeable effect on domestic commerce, U.S. import commerce, or the export opportunities of a person engaged in exporting from the United States. See H.R. REP. NO. 97-686, at 9 (1982) ("A transaction between two foreign firms, even if American-owned, should not . . . come within the reach of our antitrust laws . . . absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. [W]holly foreign transactions as well as export transactions are covered by the [FTAIA], but import transactions are not."); Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985)

(effect of FTAIA is limited to export transactions); PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶ 236'a (1997 Supp.) ("[Congress] altered, or perhaps codified, the test for subjecting export restraints to antitrust law . . . ."); BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 96 (2d ed. 1994) (The FTAIA is relevant only with respect to "export transactions and purely foreign transactions."). It does not establish any additional jurisdictional requirements to be applied to alleged restraints -- whether arising from domestic or foreign anticompetitive conduct -- on domestic commerce. Nor does it affect the jurisdictional analysis applicable to conduct, whether foreign or domestic, that is alleged to restrain U.S. import commerce. See H.R. REP. NO. 97-686, at 9 (1982) ("[I]t is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the [Sherman Act]."). With respect to restraints on either domestic or import commerce, the well-established jurisdictional rules elucidated in McLain and Hartford Fire are controlling.

Congress' limited intent is clear from the FTAIA's legislative history, which makes clear that "the legislation ha[s] no effect on the application of the antitrust laws to imports," and states that the statute limits jurisdiction over export and purely foreign transactions to those which create a direct, substantial and reasonably

foreseeable effect on domestic commerce. H.R. REP. NO. 97-686, at 9-10 (1982). See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n. 23 (1993) (The FTAIA "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.").

B. The FTAIA does not apply to plaintiffs' claims about the destruction of their trade shows because the defendants' alleged conduct involved a restraint on either domestic or import commerce or both.

Plaintiffs allege that the defendants' anticompetitive conduct restrained domestic commerce. Specifically, plaintiffs allege (i) that the defendants, U.S. importers of oriental rugs, prevented U.S. retailers of those rugs from doing business with the U.S.-based organizer of a trade show that was held in the U.S.; (ii) that defendants' anticompetitive acts were intended to, and did, prevent the plaintiffs' trade shows, at which U.S. retailers were given the opportunity to buy rugs directly from foreign manufacturers, from eroding defendants' monopoly in the domestic wholesale market for oriental rugs; and (iii) that the defendants, in order to protect their domestic monopoly, entered into an agreement in the U.S. and engaged in anticompetitive conduct in the U.S.

The conduct alleged by plaintiffs can also be deemed to be a restraint of import commerce. Specifically, because (i) the trade shows involved the sale to U.S. retailers of rugs manufactured abroad, (ii) plaintiffs' intent was to compete

with defendants' import business, and (iii) plaintiffs' trade shows, if successful, would have diverted a portion of defendants' import business, the alleged anticompetitive conduct restrained import commerce.

In either case, whether it involves a restraint of domestic commerce, a restraint of import commerce, or both, the FTAIA does not apply. Instead, ordinary principles of Sherman Act jurisdiction govern the district court's subject matter jurisdiction over plaintiffs' antitrust claims.

The magistrate's decision to apply the FTAIA was based on two errors. First, he held that the FTAIA applies wherever the anticompetitive conduct alleged "involve[s] trade or commerce with foreign nations." RR 5. To the contrary, as explained above, the FTAIA governs only subject matter jurisdiction over restraints on U.S. export commerce and wholly foreign transactions. It does not govern import commerce. Nor does it govern restraints on U.S. domestic commerce merely by virtue of the fact that the commerce alleged to have been restrained involved some sale of a good manufactured outside the U.S. For example, if these U.S.-based defendants had conspired to fix the prices at which they sold rugs to U.S. retailers, it would make no difference that the rugs came from Pakistan or Turkey rather than a rug factory in Dalton, Georgia -- the restraint would involve U.S. domestic commerce, and the FTAIA would therefore not apply. Cf. Matsushita

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The magistrate also erred when he held that the FTAIA's exception for import commerce did not apply on the ground that that exception had been "interpreted . . . as limited to domestic importers only." RR 5. This proposition has no basis in the text or legislative history of the FTAIA, which make clear that the import exception applies if the allegedly anticompetitive conduct at issue involves import commerce.[3] So long as the anticompetitive conduct alleged involves U.S. import commerce, the exception applies regardless whether the plaintiff is an importer.

The magistrate cited an unpublished district court decision, S. Megga Telecommunications Ltd. v. Lucent Technologies, Inc., 1997 WL 86413 (D. Del., Feb. 14, 1997)), in support of his narrow reading of the exception. But that case involved conduct that affected only foreign commerce, not import commerce. The plaintiffs in S. Megga were Hong Kong and Malaysian corporations that were induced by the defendant, an American telecommunications equipment company, to build Chinese facilities that would assemble, under defendant's license, cordless

[3]The FTAIA provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . . ." (Emphasis added). See also H.R. REP. NO. 97-686, at 10 (1982) (The intent of the FTAIA "is to exempt from the antitrust laws conduct that does not have the requisite domestic effects." (Emphasis in original)).

telephone equipment for sale in China. After the factories were built, defendant terminated its relationship with the plaintiffs, and plaintiffs sued in the U.S., claiming that their termination was part of defendant's scheme to monopolize the U.S. market for cordless telephones. The district court correctly surmised that the conduct at issue affected only foreign commerce: Plaintiffs had never done business in the U.S. and had no plans to import any of their products into the U.S., nor did plaintiffs allege that defendants' decision to terminate the relationship affected U.S. commerce. The district court correctly applied the FTAIA and dismissed plaintiffs' antitrust claim.

In this case, plaintiffs allege conduct that restrained U.S. commerce. There is a useful analogy to Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 (S.D.N.Y. 1995). In Eskofot, a Danish firm that exported printing equipment into the United States brought suit against an American corporation and its U.K. subsidiary, alleging that the defendants had monopolized the U.S. and international markets for the printing equipment in question by repudiating (after defendants acquired a rival firm that itself made equivalent printing equipment) a joint venture in Denmark with plaintiff, which would have manufactured equipment to be imported to the U.S. The court refused to dismiss plaintiff's antitrust claims, holding that the FTAIA does not apply if the alleged antitrust violation involves import commerce:

This Court notes that the FTAIA, by its own terms, clearly states that the

> provisions of the Sherman Act do not apply to conduct involving trade or commerce, "other than import trade or import commerce," with foreign nations. The implication that the Sherman Act provisions continue to apply to import trade and import commerce is unmistakable. Plaintiff contends that defendants' actions have precluded it from exporting goods into the United States. Consequently, plaintiff's pleading alleges an impact on import trade and import commerce into the United States.

Id. at 85 (emphasis added).

C. Plaintiffs' averments with respect to the buying trips allege a restraint on import commerce, to which the FTAIA does not apply.

Plaintiffs also allege that defendants took various actions to destroy plaintiffs' business of organizing buying trips. These trips, which allowed U.S. retailers to purchase rugs directly from foreign manufacturers, and then to import these rugs into the United States, clearly involved U.S. import commerce. And as explained above, the FTAIA's import exception is not limited to claims brought by U.S. importers. Thus, the ordinary principles of Sherman Act jurisdiction, rather than the FTAIA, govern the district court's subject matter jurisdiction over these antitrust claims.

II. The Courts Have Subject Matter Jurisdiction Over Plaintiffs' Antitrust Claims Under the Well-Established Principles of Sherman Act Jurisdiction

Plaintiffs' allegations are adequate to establish Sherman Act jurisdiction regardless whether the restraints alleged are deemed to involve domestic or import commerce or both.

If plaintiffs' allegations that defendants conspired to wreck their U.S.-based

trade shows are deemed to allege a restraint on domestic commerce, plaintiffs will have established jurisdiction if they show that the restraint either interfered with the sale of rugs in interstate commerce or had a "not insubstantial" effect on interstate commerce. McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980). Because the magistrate did not view plaintiffs' complaint as alleging a restraint on domestic commerce, he did not make a finding with respect to whether rugs sold at the trade shows were intended to be shipped in interstate commerce. However, it seems clear that plaintiffs are entitled to jurisdiction on the second basis -- i.e., that the alleged restraint affected a not insubstantial amount of interstate commerce.

Both the Supreme Court and this Court have recognized that the showing of an actual effect on interstate commerce is not necessary to establish jurisdiction under the effects test. Rather, the test is satisfied if the conspiracy alleged would, if successful, have the required effect. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991) (The "proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful. . . . Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction."); Fuentes v. South Hills Cardiology, 946 F.2d 196, 199-200 (3d Cir. 1991) (same); Ancar v. Sara Plasma, Inc., 964 F.2d 465, 469 (5th Cir. 1992) (applying Summit Health and holding that "[t]he interstate effect need not have

occurred if the planned conspiracy would have harmed interstate commerce.").[4]

Plaintiffs allege that defendants have attempted to monopolize a business that defendants themselves contend is worth approximately $1 billion[5] and that defendants sell rugs wholesale to retail outlets throughout the United States. Compl. 5, 8, 9. Plaintiffs also allege that their buying trips and trade shows were intended to divert a portion of defendants' oriental rug importing and wholesaling business. Given these allegations, it is clear that the alleged conspiracy could potentially, if successful, affect many millions of dollars of interstate commerce, which is a "not insubstantial" amount under any measure.

Defendants may object that plaintiffs have not shown that their trade shows were likely to succeed or to divert any substantial amount of defendants' business. Such an objection, if supported by evidence, may limit the damages plaintiffs ultimately recover or may even preclude damages entirely. It does not, however, bear on subject matter jurisdiction. Again, as the Supreme Court made clear in Summit Health, the test for subject matter jurisdiction is whether the alleged conspiracy, if successful, could

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[4]We take no position on whether plaintiffs would have to show an actual effect in order to gain jurisdiction under the FTAIA, because that statute does not apply to plaintiffs' claims.

[5]See Defendants' Memorandum of Points and Authorities In Support of Judge Haneke's Report and Recommendation, filed March 16, 1998, at p. 2.

potentially affect interstate commerce. And as Judge Posner noted in his opinion for the court in Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994), a plaintiff need not show "that running this plaintiff out of business would have a substantial impact" on interstate commerce:

> In an industry or sector, however immense, in which most units of production are small . . . an insistence by the courts that each cartel be shown to have a demonstrable effect on interstate commerce would allow the entire industry to be cartelized, piecemeal, with impunity . . . . The law does not require such a showing.

Id. at 781, 782 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959). Cf. International Salt Co. v. U.S., 332 U.S. 392, 396 (1947) ("Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.").

The conspiracy alleged by plaintiffs, if successful, would have destroyed price competition from plaintiffs' shows and may also have discouraged any other potential new entrants from attempting to compete with defendants in the future. Again, given the large size of market for oriental rugs, many millions of dollars of domestic commerce could have been affected by the alleged restraint, and the district court therefore clearly has jurisdiction to hear plaintiffs' claims.

Finally, with respect to plaintiffs' allegations of restraints on import commerce,

the Supreme Court has made clear that the Sherman Act applies to anticompetitive conduct affecting imports "that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6 (1986). In the view of the Department of Justice, the "intent" element of this test is satisfied almost automatically: The Department's 1995 Antitrust Enforcement Guidelines for International Operations state that "[i]mports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the Hartford Fire test." With respect to the substantiality element of the Hartford Fire test, the focus again is whether the conspiracy alleged would be likely, if successful, to impose the required substantial effect. Summit Health, 500 U.S. at 330. For the same reasons stated above with respect to jurisdiction over the alleged restraint involving domestic commerce, the district court has subject matter jurisdiction over plaintiffs' claims involving import commerce.

CONCLUSION

For all the reasons stated above, this Court should reverse the district court's order dismissing plaintiffs' complaint and remand for further proceedings.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(A)(7)(b)(i). It has 3883 words printed in 14 point proportionally spaced serif type.

Christopher Sprigman

CERTIFICATE OF SERVICE

I, Christopher Sprigman, hereby certify that on this 5th day of April 2000, I caused to be served a copy of BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT by first-class mail on the following:

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